

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TOBIE RAY DAWE)	
Claimant)	
)	
VS.)	
)	
THE ARNOLD GROUP)	
Respondent)	Docket No. 1,067,719
)	
AND)	
)	
ZURICH AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 28, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Joseph J. Seiwert of Wichita, Kansas, appeared for claimant. Meredith L. Moser of Overland Park, Kansas, appeared for respondent.

The ALJ found the back injury claimant sustained October 18, 2013, is a natural and probable consequence of claimant's compensable right shoulder injury occurring October 14, 2013. Further, the ALJ determined claimant's neck injury is either a direct result or a natural and probable consequence of the October 14, 2013, accident; therefore, the ALJ authorized medical treatment for both claimant's neck and back.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 25, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's alleged back injury is the result of an activity of daily living. Moreover, respondent argues the October 14, 2013, accident is not the prevailing factor in causing claimant's neck and back conditions, and no nexus exists between work and these conditions. Respondent accepts claimant's initial right shoulder injury as compensable.

Claimant contends the ALJ's Order should be affirmed. Claimant argues his primary right shoulder injury of October 14, 2013, caused him to alter his performance of certain activities and is the primary factor in causing the subsequent injuries to his low back and neck.

The sole issue for the Board's review is: Did claimant's neck and back injuries arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent, a temporary employment service, in several different positions. His last position was at Kan-Pak, where he performed as a downline operator. His work tasks included moving product from a conveyor and placing it on pallets, caring for the box machine, and properly loading boxes. Claimant would then stack these boxes on a pallet.

On October 14, 2013, claimant was placing a box on a pallet at "about head level" when he felt pain and weakness in his right shoulder.¹ Claimant testified the pain worsened, and he reported the accident to the supervisor on duty. The supervisor had claimant return to work that day. Claimant stated he reported the accident to respondent the following morning, and respondent provided medical treatment.

Claimant initially treated with Dr. John Winblad, who determined claimant sustained a right rotator cuff injury/partial rotator cuff tear. Claimant was prescribed medication and referred for an MRI scan and orthopedic evaluation with Dr. Justin Strickland.

Claimant's first appointment with Dr. Strickland was scheduled for October 18, 2013. Claimant indicated Dr. Strickland's office was a round trip distance of 125 miles. On the way to his appointment, claimant and his wife stopped to fill their vehicle with gasoline in anticipation of the trip. Claimant testified:

When we stopped, there's a Love's gas station two blocks from our house, and we stopped to get fuel there. And as – I was a passenger in the car, and I wasn't using my right shoulder or my right arm, so I reached with my left arm to pull myself out of the vehicle, and I – you know, not being a doctor or anything of that nature, I don't know exactly what happened in my back, but something did.²

Claimant stated he felt extreme pain in his low back, extending into his buttocks and leg. Claimant remained in the vehicle because of his back pain. Claimant continued to his appointment with Dr. Strickland.

¹ P.H. Trans. at 7.

² *Id.* at 9.

Dr. Strickland determined claimant sustained right shoulder strain and a very small partial thickness rotator cuff tear. Dr. Strickland treated claimant conservatively with medications, physical therapy, and injections. Dr. Strickland provided claimant with restrictions of no heavy lifting and no repetitive motion of the right shoulder. Claimant continued to follow up with Dr. Strickland, and surgery for claimant's right shoulder was scheduled for March 13, 2014, when conservative treatment proved ineffective.

Claimant testified he developed pain in his neck within the week of the October 14, 2013, incident. Claimant was unsure how it began but related the pain to either his shoulder accident or the onset of his back pain while twisting in the vehicle. Claimant described his neck pain as "a lot of stiffness up through my neck on the right side, pain from dull to sharp."³

Claimant testified he has some mobility issues and discomfort in his low back while bending. He explained:

I've been having some pains in my, you know, where it's radiated down into my buttocks and a little bit into my right leg. I've noticed kind of a weird sensation. Sometimes I feel like there's a cell phone in my pocket on vibrate. I kind of get a tingling vibrating feeling in my leg. A lot of stiffness early in the morning. Usually the stiffness works out within an hour or so, . . . but there's still a lot of dull pain . . .⁴

On January 23, 2014, Dr. George G. Fluter evaluated claimant at his counsel's request for purposes of an independent medical evaluation (IME). Claimant presented with constant pain in his right shoulder, neck, back, bilateral hips, and a vibrating sensation affecting the right lateral hip and thigh. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Fluter diagnosed claimant as status post work-related injury; right shoulder pain/impingement/tendonitis/bursitis; probably right shoulder internal derangement; neck/upper shoulder/shoulder girdle pain; cervicothoracic strain/sprain; low back pain/bilateral hip/thigh pain; and lumbosacral strain/sprain. Dr. Fluter opined:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported work-related injury occurring on 10/14/13.

Symptoms affecting the neck/upper shoulder/shoulder girdle are the result of biomechanical inefficiencies caused by the shoulder injury. [Claimant] experienced the onset of back pain while attempting to exit his vehicle awkwardly

³ *Id.* at 13.

⁴ *Id.* at 14.

because he had been advised to limit the use of his right arm prior to orthopedic evaluation.

. . . The prevailing factor for the injury and the need for medical evaluation/treatment it [*sic*] the reported work-related injury occurring on that date. Symptoms affecting the neck/upper shoulder/shoulder girdle and low back are the result of that injury.⁵

Dr. Flutter recommended temporary restrictions of light level of physical demand. Dr. Flutter further recommended treatment with pain medication, imaging studies of the cervical and lumbar spine, orthopedic follow up, physical therapy for the cervical and lumbar spine, a TENS unit trial, possible interventional pain management, and possible surgical consultation regarding the cervical and lumbar spine dependent upon claimant's response to treatment.

Claimant has not worked since October 18, 2013.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states: "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 2013 Supp. 44-508(h) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

⁵ P.H. Trans., Cl. Ex. 1 at 4-5.

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2013 Supp. 44-555c(j).

ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the conditions on which that right depends.⁸ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁹

Respondent argues claimant’s neck injury is not related to the initial accident. Dr. Fluter wrote claimant’s neck complaints are related to the initial injury, and the October 14, 2013, work-related accident is the prevailing factor for claimant’s neck complaints. This opinion is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless it is untrustworthy.¹⁰ The undersigned finds claimant’s neck injury arose out of and in the course of his employment with respondent.

Respondent also argues the claimant’s low back problems are not directly traceable to the initial injury because the injury occurred four days after the work-related accident, while claimant was not engaged in any work-related activity. According to the uncontroverted testimony of claimant and opinion of Dr. Fluter, the low back injury resulted from a compensation maneuver directly related to claimant’s shoulder injury. It is significant that Dr. Fluter noted in his report, after reviewing Dr. Winblad’s records, claimant “had been advised to limit the use of his right arm prior to the orthopedic evaluation.”¹¹

In *Jackson v. Stevens Well Service*,¹² the Kansas Supreme Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syl. ¶ 1.)

The secondary injury rule allows an injured employee to receive compensation for all of the natural consequences arising out of an injury, including any new and distinct

⁸ K.S.A. 2013 Supp. 44-501b(c); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁹ K.S.A. 2013 Supp. 44-508(h).

¹⁰ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

¹¹ P.H. Trans., Cl. Ex. 1 at 5.

¹² *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

injury that is a direct and natural result of the primary injury.¹³ The onset of back pain resulting from claimant's using his left arm to exit his vehicle, because he was instructed not to use his right arm, is a natural consequence of the initial injury.

The only other medical evidence in the record are records from Dr. Strickland. Dr. Strickland's records consist of two follow-up examinations and are incomplete, as they exclude the initial examination report and other treatment records prior to the follow-up examination of December 30, 2013. Dr. Strickland's records are silent regarding causation. Claimant's initial treatment was provided by Dr. Winblad, whose records were not placed in the record. As such, Dr. Fluter's causation opinions are uncontradicted.

The undersigned finds the evidentiary record sufficient to prove claimant met his burden of showing both a neck and back injury related to the October 14, 2013 work-related accident.

CONCLUSION

Claimant's suffered a compensable low back and neck injury arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated February 28, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

¹³ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515, 154 P.3d 494 (2007).

c: Joseph J. Seiwert, Attorney for Claimant
jjseiwert@sbcglobal.net
nzager@sbcglobal.net

Meredith L. Moser, Attorney for Respondent and its Insurance Carrier
meredith.moser@zurichna.com

Gary K. Jones, Administrative Law Judge